92-734

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CHEEVES & THEDORE GIBSON, ET AL.
Petitioners

v.

SOUTHERN CLAYS, INC., ET AL.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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September 24, 1992

Counsel for Petitioners

QUESTIONS PRESENTED

In Petitioners' consolidated civil cases the Chief Judge of the Eleventh Circuit Court of Appeals has **twice** within the last seven months **temporarily** disqualified all three district judges of the Middle District of Georgia, including Petitioners' presiding judge, Chief Judge Owens. Acting pursuant to 28 U.S.C. § 292(b) upon the ground that in his "judgment the public interest so requires," Chief Judge Tjoflat has **twice** entered orders **temporarily** assigning a United States District Judge for the Middle District of Florida to sit in Petitioners' cases instead of **permanently** assigning Petitioners' cases to an impartial judge.

QUESTION NO. 1

In the case of district judges whose impartiality is questionable enough to require "in the public interest" the appointment of other judges, does not the use of **temporary** appointments of other judges under § 292(b) circumvent and violate the disqualification and **permanent** reassignment mandates of the Fifth Amendment, 28 U.S.C. 455(a), Judicial Canon 3C(1) and 1990 ABA Model Judicial Canon 3E(1)?

QUESTIONS PRESENTED

In Petitioners' cases their counsel filed with the Eleventh Circuit Judicial Council a judicial misconduct complaint under 28 U.S.C. § 372(c) against Chief Judge Wilbur D. Owens, Jr. and District Judge Duross Fitzpatrick. Chief Judge Tjoflat appointed a Special Committee which conducted a twenty-month investigation of the district judges. Objective facts present the appearance that Chief Judge Owens' **first act** upon learning that Petitioners' counsel's misconduct complaint would be dismissed on June 8, 1992, was to deny Petitioners' last § 455(a) recusal motion and order Petitioners' counsel within "thirty days to show cause in writing why the court should not impose Rule 11 sanctions" upon Petitioners' counsel for "harassment" of the court.

QUESTION NO. 2

Applying the objective appearances test of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988) to the objective facts summarized above and detailed, *infra*, would the appearances of a district judge's reprisal and retaliation against counsel for the filing of § 372(c) charges -- charges serious enough to warrant a twenty-month Special Committee investigation -- present an appearance of impropriety compelling the disqualification of the retaliating judge.

RULE 14(b) STATEMENT

The Cheeves petitioners are Lillian Cheeves Bond, Julia Inez Trawick Butts, Mamye Trawick Butts, Curtis Cheeves, Edna Mae Cheeves, Ernestine Cheeves, Frank Cheeves, Hazel Cheeves, Henry Cheeves, III, Lola Cheeves, Sarah Cheeves, Gloria Jean Crumbly, Edgar Crumbly, Jr., Curtis Elliott, Sheila Mills Gilbert, Myrian Trawick Hall, Gloria Louise Trawick Lord, Fleta Hooks Randolph, Marilyn Swinton, Clyde Trawick, Laurty Trawick, Marvin Trawick, Mary Cheeves Trawick and Stephanie Cheeves Tribble.

The Gibson petitioners are Ada Gibson Bond, Alfred G. Gibson, Robert Lee Gibson, Thedore Gibson, Willie James Gibson, Griffin Lewis, Jerry Lewis, Jimmie Lewis, Jr., Jimmie Lewis, Sr., Karen Lewis, Michael Lewis, Myron Lewis, Mary Gibson Robinson, Richard Shinholster and Sara F. Gibson Simmon.

The defendants/respondents in both Cheeves and Gibson are Southern Clays, Inc. and the Rhode Island Charities Trust.

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SOUTHERN CLAYS, INC., ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that the Eleventh Circuit's order denying disqualification of Petitioners' trial judge be reversed through issuance of a *per curiam* writ of certiorari directing that Petitioners' cases be **permanently** reassigned to an impartial judge.

I. ORDERS BELOW

The Eleventh Circuit's order of June 26, 1992 denying Petitioners' Petition for Writs of Mandamus and Prohibition is reproduced at page 1 of the attached Appendix. The December 30, 1991 and July 27, 1992 orders of Chief Judge Tjoflat **temporarily** assigning and designating District Judge Hodges of the Middle District of Florida to sit in Petitioners' cases in the Middle District of Georgia pursuant to 28 U.S.C. 292(b) are reproduced respectively in the Appendix at pages 2-3 and 4-5.

The retaliatory "show cause" order of Chief Judge Owens entered June 5, 1992, denying recusal and directing Petitioners' counsel "to show cause in writing why the court should not impose Rule 11 sanctions" against Petitioners' counsel for "harassment" of the court is reproduced in the Appendix at pages 6-9. This order was the subject of Petitioners' Petition for Writs of Mandamus and Prohibition filed in the Eleventh Circuit on June 12, 1992.

II. JURISDICTION

The Eleventh Circuit entered its *per curiam* order (Appx. A-1) denying Petitioners' Petition for Writs of Mandamus and Prohibition on June 26, 1992. This Petition is timely filed within 90 days of June 26, 1992. Jurisdiction as to the writ of certiorari sought hereby is invoked under 28 U.S.C. § 1254(1). Petitioners have also separately filed a petition for writs of mandamus and prohibition.

III. CONSTITUTION AND STATUTORY PROVISIONS INVOLVED[1]

Fifth Amendment to Constitution.

> No personal shall ... be deprived of life, liberty or property without due process of law....

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[1] Unless otherwise indicated, all emphasis supplied by boldface, italics, or underlined text is that of Petitioners' counsel.

28 U.S.C. § 455(a)

> (a) Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his *impartiality might reasonably be questioned.*

Canon 2, Code of Judicial Conduct for United States Judges

> **A judge should avoid impropriety and the appearance of impropriety in all his activities.**
>
> A Judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the *integrity and impartiality of the judiciary.*

Canon 3C(1), Code of Judicial Conduct for United States Judges

> C. Disqualification.
> (1) A judge *shall* disqualify himself in a proceeding in which his *impartiality might reasonably be questioned ...*

Canon 3 E(1)(a), ABA 1990 Model Code of Judicial Conduct[2]

> **A judge shall perform the duties of judicial office impartially and diligently.**

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[2] Approved by ABA House of Delegates on August 7, 1990. A LEXIS search on September 21, 1992, disclosed only the following reported decision under Canon 3E(1)(a): *United States v. Ahmed*, 788 F. Supp. 196 (S.D. N.Y. 1992). The Honorable Wilbur D. Owens, Jr. in his order of June 5, 1992, (Appx. 6-9) cited Canon 3 E(1) as the standard under which he disclaimed any bias or prejudice against Petitioners' counsel or his clients. (Appx. 7).

E. Disqualification.
(1) A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned,* including but not limited to instances where (1) the judge has a personal *bias or prejudice* concerning a party or a *party's lawyer* ....

28 U.S.C. § 292(b).

§ 292 District judges

(b) The chief judge of a circuit may, *in the public interest,* designate and assign *temporarily*[3] any district judge of the circuit to hold a district court in any district within the circuit.

28 U.S.C. § 2106.

§ 2106. Determination
The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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[3] Petitioners' contend that Chief Judge Tjoflat, instead of utilizing § 292(b) to assign a district judge temporarily to special aspects of Petitioners' cases should have utilized § 292(b) to reassign a district judge to sit temporarily for the remaining duration of Petitioners' cases. Of course this Court and the Eleventh Circuit panel below have the power to order a reassignment of Petitioners' cases to another district judge pursuant to 28 U.S.C. § 2106.

IV. STATEMENT OF THE CASE

A. Nature of Petitioners' Civil Cases.

Petitioners consist of 39 black citizens who are the heirs at law of forbears who sold their middle-Georgia lands to the defendants/respondents Southern Clays, Inc. and its sole shareholder, The Rhode Island Charities Trust. Petitioners' cases were filed separately in early 1986, later consolidated, and remain pending today before Chief Judge Owens of the Middle District of Georgia.

In similar fashion to the Ute Indians who were defrauded in the ***sale*** of their interests in underground oil, gas and oilshale, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1971), Petitioners allege in their common law fraud and equitable recission cases that their ancestors were defrauded in the sale of 15 million tons of crude underground "kaolin"[4] reserves worth today at least 30 million dollars.

B. Petitioners' First Apprehensions of Bias and Prejudice.

Beginning in mid-1989 Petitioners and their counsel began to apprehend that Judge Owens harbored an undis-

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[4] Koalin is a valuable white clay indispensable to the manufacture of glossy magazine paper and fine ceramics. According to the five companies which dominate Georgia's kaolin industry, Georgia produces 60% of the entire world output of this extremely valuable industrial mineral.

closed bias and prejudice against a black man named Robert L. Watkins, a resident of middle-Georgia. Because most of Petitioners live outside of Georgia, they had given Watkins, a non-lawyer, limited powers of attorney to prosecute their fraud claims on Petitioners' behalf and agreed to compensate him by paying Watkins fifteen percent of any recovery.

In 1987 Watkins became the subject of a federal grand jury investigation, unbeknownst to Petitioners and their counsel, on the complaint of District Judge Fitzpatrick after conferring with Chief Judge Owens about perjured deposition testimony which had occurred in an unrelated quiet-title action known as *Tarbutton v. All That Tract of Land*, 641 F. Supp. 521 (M.D. Ga. 1986). Judge Fitzpatrick suspected Watkins of having "procured, aided and abetted" the perjured testimony of the civil deposition witness in Tarbutton.

After a grand jury no-billed the first presentment against the Petitioners' attorney-in-fact in early 1989, unbeknownst to Petitioners and their counsel, Judge Fitzpatrick intervened with the General Litigation and Advice Section of the Justice Department in requesting reconsideration of the Section's denial of the U.S. Attorney's request to make a second presentment against Watkins. After Judge Fitzpatrick's intervention the Justice Department reversed itself and the U.S. Attorney thereafter succeeded in indicting Watkins in 1989 on one count

of aiding and abetting the perjury of a civil deposition witness. Chief Judge Owens, Petitioners' presiding judge, denied Watkins' pre-trial recusal motion and presided over one mistrial resulting from a deadlocked jury and a second trial in which Watkins was convicted and later sentenced to five years and $50,000.

C. History and Scope of Recusal Motions.

Beginning in mid-1989 Petitioners' counsel sensed an animus by Judge Owens toward Watkins and became uneasy about certain stated opinions of Judge Owens respecting Watkins which seemed remarkably similar to those of Judge Fitzpatrick, who by this time had disclosed in May of 1989 his instigation of Watkins' criminal investigation. Judge Fitzpatrick eventually admitted in August of 1989 (prior to Watkins' January 10, 1990 conviction) that he held a personal bias and prejudice against Watkins and recused himself from a civil "kaolin" case involving Watkins' aunts, uncles and cousins. These developments prompted Petitioners' counsel to file the series of recusal motions complained of in Judge Owens' "show cause" order of June 5, 1992. (Appx. 6-9).

Because these recusal motions purportedly constitute the "harassment" charged in Judge Owens' retaliatory "show cause" order of June 5, 1992, (Appx. 6-9) brief attention should

be paid to Judge Owens' misstatements of fact. First the various recusal motions did not rely upon the "same grounds" (Appx. 6) nor did they contain the "same allegations." (Appx. 8). To the contrary each successive motion was predicated on additional, newly discovered disqualifying facts or recent events raising even greater appearances of impropriety. The first three motions exclusively relied upon disqualifying appearances vis-a-vis Judge Owens and Petitioners' personal representative, Watkins, whom Judges Owens and Fitzpatrick consistently characterized as a defacto party in Petitioners' cases.

In contrast the last two recusal motions, although they incorporated prior motions by reference, **focused principally upon the appearances of bias and prejudice toward Petitioners' *counsel* as a result of counsel's filing of a 28 U.S.C. § 372(c) complaint against Judges Owens and Fitzpatrick on July 20, 1990, and ensuing events during the Special Committee's twenty-month investigation of both judges.** Thus **none** of the events asserted in the fourth and fifth recusal motions had **even occurred** as of Judge Owens' denial of the third Watkins-based recusal motion on May 27, 1990.

D. Former Cheeves & Gibson Mandamus Petition.

A former mandamus petition, *In re Thedore Gibson, et al.*, Appeal No. 90-8561, was denied *per curiam* by Circuit

Judges Fay, Kravitch, and Clark on June 25, 1990. A petition for rehearing and suggestion of rehearing *en banc* was denied *per curiam* on September 18, 1990. The prior *Cheeves & Gibson* petition was exclusively Watkins-based and involved none of the disqualifying appearances later spawned by Petitioners' counsel's § 372(c) complaint filed July 20, 1990, and subsequent events which became the subject of Petitioners' fourth and fifth recusal motions relying upon Judge Owens apparent bias and prejudice against Petitioners' ***counsel***.

E. Petitioners' Counsel's § 372(c) Complaint .

The appearances of disqualification and reprisal at issue in this Petition principally arise from the following undisputed events. On July 20, 1990, Petitioners' counsel filed Judicial Misconduct Complaint No. 90-2132 ("the Complaint") pursuant to 28 U.S.C. § 372(c) against Judges Owens and Fitzpatrick with the Eleventh Circuit Judicial Council. The Complaint charged the judges, *inter alia*, with concerted and wilful violations of the disqualification and recusal mandates of 28 U.S.C. §§ 144 and 455, and Canons 3A(4) and 3C(1) of the Code of Judicial Conduct for United States Judges. Before even receiving the judges' answers Chief Judge Tjoflat found cause to appoint a Special Committee pursuant to 28 U.S.C. § 372(c)(4) and Judicial Council Rule 4 and issued his notice of

the appointment of a Special Committee dated September 14, 1990.

On January 21 and 22, 1991, Petitioners' counsel met with the Special Committee's private investigative counsel, Alan Sundberg, Esq., a former justice of the Supreme Court of Florida, and his partner, Alan Wagner, Esq. Petitioners' counsel explained in great detail the apparent judicial misconduct committed by Judges Owens and Fitzpatrick, identified numerous witnesses who could give testimony in support of the Complaint, and answered all questions asked by investigative counsel.

Because Petitioners' counsel was disquieted by the investigative counsels' seeming disinterest in facts raising appearances of concealment and lying to counsel by Judges Owens and Fitzpatrick respecting matters possibly material to their disqualification, Petitioners' counsel sought the advice of an Assistant United States Attorney in Atlanta. On this attorney's advice based on his call to the Chief of the Public Integrity Section of the Criminal Division of the Justice Department, Petitioners' counsel summarized in correspondence dated January 24, 1991, the apparent misconduct of Judges Owens and Fitzpatrick for the Public Integrity Section of the Criminal Division. Petitioners' counsel reported conduct of Judge Fitzpatrick possibly violating 18 U.S.C. § 201 (brib-

ery) and summarized facts raising the appearance that Judge Owens and Judge Fitzpatrick, acting individually and in concert, had obstructed justice under the omnibus clause of 18 U.S.C. § 1503. After January 24, 1991, Petitioners' counsel cooperated with the Public Integrity Section and the Federal Bureau of Investigation in providing additional information and documents relevant to their subsequent criminal investigation, which Petitioners' counsel was advised would be limited to only to the bribery allegations involving Judge Fitzpatrick.

Petitioners' counsel subsequently provided additional information to investigative counsel and testified before the Special Committee against Judges Owens and Fitzpatrick, in their presence, on October 9, 1991, and February 18th and 19th, 1992. On February 17, 1991, exercising his right as a § 372(c) complainant to file written argument with the Special Committee, Petitioners' counsel filed a 185-page brief supported by 84 documentary exhibits. The argument extensively reviewed the limited facts and documents then available to Petitioners' counsel[5] and sought to demonstrate that available evidence circumstantially raised the appearance of crimi-

[5] The confidentiality constraints of § 372(c)(14) denied Petitioners' counsel access to the judges' written answers to the Complaint, the report of investigative counsel, and testimony and exhibits of all witnesses called before the Special Committee, including the judges' testimony.

nal obstruction of justice (18 U.S.C. § 1503) and criminal violations of Petitioners' civil rights (18 U.S.C. §§ 241 & 242).

Petitioners' counsel's last testimony left him with the impression that the Special Committee was more interested in attacking the accuser than in considering the worst implications of much of the undisputed circumstantial evidence against the judges. This impression was confirmed by the Special Committee Report made public on June 8, 1992 in conjunction with the § 372(c) complaint's dismissal. For example, the Special Committee Report based on information not available to Petitioners' counsel termed the bribery charges respecting Judge Fitzpatrick's land transaction with Nord Kaolin Company "malicious". Also, as to a rumored phone call by Judge Fitzpatrick respecting Robert Watkins, information which Petitioners' counsel clearly identified as second hand rather than **personal** knowledge, the Special Committee claimed "fabrication" by Petitioners' counsel.

F. Chief Judge Tjoflat's § 292(b) Appointments.

Chief Judge Tjoflat's orders of December 30, 1991 (Appx. 2-3) and July 27, 1992 (Appx. 4-5) temporarily appointing District Judge Hodges of the Middle District of Florida to sit on only certain aspects of Petitioners' cases almost speak for themselves. The first order appointed Judge Hodges to rule

on the U.S. Attorney's motion to quash deposition subpoenas served by Petitioners' counsel in an effort to compel all three Middle District judges to disclose fully their knowledge of matters relevant to their disqualification. Such subpoenas were served with the express advice that Petitioners sought such discovery for purposes of filing a new recusal motion, and mandamus petition, if necessary, based upon a **complete** record. Chief Judge Tjoflat's second designation order directed Judge Hodges to sit upon the "show cause" hearing scheduled upon Judge Owens' "show cause" order of June 5, 1992. (Appx. 6-9).

Chief Judge Tjoflat's § 292(b) orders raise more questions than they answer. No docket crisis or physical or mental disability of the three Middle District judges explains the need for such orders. So what "public interest" stood to be served by these orders other than protection of the appearance of judicial integrity and impartiality in the Middle District? What jeopardized the public interest **other than** numerous appearances of impropriety in the context of objective facts casting doubt on all three judges' impartiality.

Who requested such § 292(b) appointments? If requested by one or more of the District Judges, what "public interest" did the judges seek to vindicate beyond their own recognition that their impartiality might seriously be ques-

tioned. If such requests were made, why would they not evidence a deliberate and calculated effort to circumvent *sua sponte* recusal obligations under § 455(a) and the Judicial Canons?

If such § 292(b) appointments were not requested by any of the district judges, what accounts for Chief Judge Tjoflat's conclusion that "the public interest so requires" other than his own determination to guard judicial integrity and impartiality with his defacto disqualification of all three Middle District judges through Judge Hodges' temporary appointment to abate the latest crisis in Petitioners' cases? Twice now Chief Judge Tjoflat has so acted. How many times must a judge's impartiality become questionable enough to prompt his temporary replacement before such judge obeys the supposedly self-enforcing, *sua sponte* obligations of § 455? Does § 455 stand for the proposition that a judge's impartiality must become questionable twice or even thrice before he is obligated to act?

Petitioners' have no means of compelling answers to the foregoing queries. That such questions need be answered at all raises appearances which would trouble any disinterested lay observer. Given the ambiguous nature of Chief Judge Tjoflat's § 292(b) appointments, even the most trusting, non-suspicious observer would wonder why the "public interest" supposedly being served by Chief Judge Tjoflat is such

that he cannot leave Middle District judges to quash their own subpoenas and handle their own Rule 11 show cause orders in Petitioners' cases.

G. Judge Owens' Rule 11 "Show Cause" Order.

Determining whether Judge Owens' "show cause" order of June 5, 1992 (Appx. 6-9) presents at least the appearance of a reprisal and retaliation against Petitioners' counsel requires brief consideration of only the following facts.[6]

First, consider the fact that Petitioners' fifth recusal motion focused on and incorporated by reference the same 185-pages of argument which Petitioners' counsel had filed as the complainant in the § 372(c) proceeding. Petitioners' argument to the Special Committee (to which Judge Owens was privy) and Petitioners' fifth recusal motion are indistinguishable. Before Judge Owens, however, Petitioners' counsel's § 372(c) arguments relied upon in the **judicial** context of a recusal motion constitute "harassment."

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[6] This issue of protecting counsel from reprisals or sanctions for filing § 372(c) complaints is among the foremost recommendations of the Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility, a study of § 372(c) operation and effectiveness through 1989. *"We firmly support the proposition that the judge who is the subject of a complaint should have no authority to sanction the complainant directly or indirectly."* Twentieth Century Fund, *The Good Judge* at 10-11 (1989) (emphasis in original).

Second, the Special Committee's investigative counsel did not dismiss Petitioners' counsel's § 372 charges as "harassment."

> "The § 372 complaint raises serious claims of misconduct by Judges Fitzpatrick and Owens involving the trio of kaolin cases and the Watkins prosecution and conviction.
>
> * * *
>
> We have investigated each of Nix's misconduct claims. In the main, your investigators conclude that the allegations of misconduct are the product of inference and speculation which are based upon very slender reeds of actual fact. While the interpretation and liberal extrapolation by Nix of the limited facts to which he had access may have understandably raised misconduct concerns, an investigation of the factual allegations of the complaint refute beyond any doubt the misconduct charges alleged in the complaint. Although we find no evidence to support the § 372 complaint, **we hasten to add that we do not believe the complaint was filed by Nix in bad faith or with an improper motive**."

Investigative Report of Messrs. Alan Sundberg and Alan Wagner filed as Defendant's Exhibit IC-A in Eleventh Circuit Miscellaneous Docket No. 90-2132 (emphasis added).

Third, consider the actual animosity toward Petitioners' counsel manifested in Judge Owens' own testimony in the Special Committee hearings. Notwithstanding Judge Owens' assertion in his order of June 5, 1992 that he "harbors no bias or prejudice against Mr. Nix or his clients" (Appx. 8), Judge

Owens' sworn testimony during his mere 25 pages of testimony before the Special Committee raises contrary appearances.

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. **I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.**
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant **other than Mr. Nix**, let's say an attorney **other than Mr. Nix**, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (emphasis added).

Taking Judge Owens at his word, what chance of success do Petitioners cases have if their lead trial counsel for the last six and one-half years must try cases involving $30,000,000 worth of mineral rights in lengthy trials before a jurist who frankly admits that he "can only deal with [Petitioners' counsel] if I say as little as necessary." ? Id. How is Petitioners' counsel to handle what promises to be a day-long pre-trial conference, much less the trials themselves, given Judge Owens' admitted aversion to counsel's questions?

And given the fact that Petitioners' counsel "reminds [Judge Owens] a lot of some of the prisoners [he has] to deal repeatedly on 2255," (Id.) what demeanor toward counsel is Judge Owens likely to transmit to the jury. Every trial lawyer knows that any judge can use the arch of his eyebrows, his tone of voice, his demeanor toward counsel, etc. to tilt the tables of justice very steeply in favor one side or the other yet produce a pristine record not suggestive of any bias or prejudice.

Finally, what is unmistakably clear from Judge Owens' above-quoted testimony is that Petitioners' cases would fair much better before Judge Owens if they simply had a lawyer "other than Mr. Nix." Section 455 imposes no duty to switch

counsel to avoid a judge's bias and prejudice against counsel. Where there exists pervasive bias and prejudice against a party's counsel, § 455(a) and new ABA Judicial Canon 3E(1)(a) relieve the party of the need to find another lawyer by entitling him to a different judge whose impartiality toward parties and their counsel is not doubtful.

A further anomalous and ironic feature of Judge Owens' "show cause" order is the fact Judge Owens alone is claiming "harassment" and seeking Rule 11 sanctions. In contrast, respondents' defense counsel have sought no such sanctions. Indeed, at the "show cause" hearing recently held before Judge Hodges on September 16th, Judge Hodges all but invited respondents' defense counsel to join in Judge Owens' move for sanctions. Defense counsel declined Judge Hodges' virtual invitation with advice to the court that respondents had not sought Rule 11 sanctions in the past and had no intention of seeking same in the future.

If the Court harbors any doubts about disqualifying Judge Owens (and his fellow judges of Georgia's Middle District) the crowning and conclusive appearance which would leave in the mind of the lay observer no doubt as to Judge Owens' bias and prejudice against Petitioners' counsel lies in Judge Owens' disparate treatment of another lawyer who also moved Judge Owens' recusal on the same grounds relied

upon by Petitioners' counsel but who had filed no § 372(c) charges against Judge Owens. Petitioners' counsel was granted an extension through July 15, 1992 to file his written response to Judge Owens' "show cause" order of June 5th. Was a § 292(b) temporary appointment of Judge Hodges deemed necessary in the "public interest" during the forty-day period from June 5th to the filing of Petitioners' counsel's written response on July 15th? Absolutely not. No, Chief Judge Tjoflat did not find that the "public interest" required another appointment of Judge Hodges until twelve days after the following response was filed by Petitioners' counsel with Judge Owens on July 15th.

> "This Response will demonstrate that the fifth recusal motion filed in the above-styled causes, which was not even addressed to The Honorable Wilbur D. Owens, Jr., but rather to The Honorable William Terrell Hodges, was well grounded in fact, warranted by existing law and not interposed for any improper purpose. Indeed, in order for this Court to find Plaintiffs' counsel guilty of "harassment", the Court would have the make the same finding with respect to L. Ray Patterson, Esq., perhaps Georgia's foremost expert in legal and judicial ethics, who filed on June 8, 1992, a motion to recuse the Court founded upon the same grounds relied upon by Plaintiffs' counsel and founded upon all seven prior recusal motions in U.S. v. Watkins and Cheeves & Gibson. Given the identical nature of the recusal motions filed by Plaintiffs' counsel

> and Mr. Patterson, why has the Court not termed Mr. Patterson's recusal motion as "harassment" and required Mr. Patterson to show cause why he should not be sanctioned under Rule 11? There is nothing in the record to account for such disparate treatment of counsel **other than** judicial misconduct and criminal charges filed by Mr. Nix but not Mr. Patterson, such that the sanctions which the Court apparently intends to impose under Rule 11 constitute purely and simply a reprisal against Mr. Nix for his exercise of rights unders laws of the United States and his adherence to obligations imposed by the Code of Professional Responsibility adopted by the State Bar of Georgia."

Response of July 15, 1992 at 1-2. Can Judge Owens deny that his reading of the above-quoted response of Petitioners' counsel prompted him to request of Chief Judge Tjoflat another temporary appointment of Judge Hodges to extricate Judge Owens once again from the jeopardy posed to his impartiality by his having yielded on June 5th to his naturally human and irresistible impulse to retaliate against Petitioners' counsel's § 372(c) charges as soon as Judge Owens knew their outcome?

V. REASONS FOR GRANTING THE WRIT.

THE DISREGARD BELOW OF THE APPEARANCES OF REPRISAL AND RETALIATION BY THE PRESIDING JUDGE AGAINST PETITIONERS' COUNSEL AND THE

PIECEMEAL USE OF § 292(B) "PUBLIC INTEREST" APPOINTMENTS TO REPLACE ONLY TEMPORARILY THREE JUDGES OF DOUBTFUL IMPARTIALITY VIOLATES DISQUALIFICATION AND REASSIGNMENT STANDARDS, REPRESENTS AN ABUSE OF DISCRETION AND UNSURPATION OF POWER, AND THREATENS PETITIONERS WITH IRREPARABLE HARM REQUIRING THIS COURT'S INTERVENTION.

The legal standards are so clear and the appearances presented so grave that the factual issue of whether this Court's intervention is warranted might well be argued and answered with but three words -- RES IPSA LOQUITUR. Nevertheless, a brief survey of applicable authorities and prior instances of this Court's intervention serve to prove that the Court has not hesitated to act in circumstances less serious than those facing Petitioners.

A. Disqualification Standards

> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865 (1988). Chief Judge Tjoflat has already apparently twice determined that circumstances in Petitioners' cases involving all three judges of Georgia's Middle District may pose the "temptation ... not to hold the balance nice, clear and true." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986). In the case of Judge Owens and the factual appearances summarized above, a disinterested observer would be hard pressed not to conclude that Judge Owens has already succumbed to temptation and proven by his above-quoted words and indisputable deeds his lack of impartiality in Petitioners' cases.

B. Lack of Adequate Alternative Relief.

The Second Circuit has observed that "there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself' ... A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Business Machines Corp.*, 618 F.2d 923, 926-27 (2d Cir. 1980). Likewise, in the seminal case of *Berger v. United States*, 255 U.S. 22 (1921), a case which predated the broad mandate of § 455(a), this Court eloquently explained the inadequacy of appellate remedies

other than mandamus.

> To commit to the judge a decision upon the truth of the facts [in the Section 144 affidavit] gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

255 U.S. at 36 (emphasis added).

Petitioners have already exhausted every conceivable remedy available before the district court and the Eleventh Circuit has denied two separate mandamus petitions. The only factual circumstance presented herein which was not argued to the Eleventh Circuit before its denial of Petitioners' last mandamus petition on June 26, 1992, was Chief Judge Tjoflat's subsequent order of July 27, 1992, appointing Judge Hodges to sit upon Judge Owens' June 5 "show cause" order issued against Petitioners' counsel.

Given the fact that the Court has stated that "the right to grant mandamus to require jury trial where it has been improperly denied is settled," *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959), it would be anomalous indeed if the Court did not find as well in Petitioners' cases that it has equal power

to grant mandamus or certiorari and require reassignment and trial before an impartial district judge where Petitioners' right to disqualification of a judge whose "impartiality might reasonably be questioned" has been improperly denied.

C. Exceptional Circumstances.

The circumstances presented here speak for themselves. To Judge Owens' claim that Petitioners' repeated recusal motions represent a "campaign" to disqualify him, the last motion supposedly rising to the level of "harassment" (Appx. 9), Petitioners would simply observe that it is the judges' conduct, not that of Petitioners, which has created the extraordinary state of affairs before this Court. The course of the § 372(c) Complaint before the Eleventh Circuit Judicial Council demonstrates the seriousness of the judges' conduct.

Chief Judge Tjoflat could have exercised his authority to dismiss the § 372(c) complaint outright had he deemed it frivolous. Instead, he deemed it necessary to appoint a Special Committee and devote twenty months of time, unknown investigative attorneys' fees, and countless hours of the precious judicial time of five Special Committee members to resolution of the complaint. The complaint proceedings alone and the actions of the Chief Judge and the Special Committee reflect **at a minimum** their belief that the complaint's objective facts possibly presented at best the "appearance of impropriety"

and at worst actual impropriety prejudicial to the integrity of the judiciary if the "worst implications" of the objective facts were realized.[7]

It is apparent that the quantum of facts in Petitioners' case warranting the extraordinarily rare appointment of a Special Committee substantially exceeded the quantum of facts under which § 455(a)'s hypothetical, fully-informed "man-in-the-street" might reasonably question the impartiality of the judges. This conclusion is inescapable unless the Court is prepared to believe that the Special Committee wasted twenty months worth of time and resources investigating appearances so inconsequential that even a fully informed objective, disinterested lay person would not give them a second thought. Accordingly, the length, scope, and expense of the Special Committee's investigation has itself become one of the single most indicative "objective facts" upon which a disinterested lay person, fully informed as to the complaint proceeding "might reasonably question the impartiality" of the judges investigated notwithstanding the dismissal of the charges.

D. Abuse of Discretion.

When it comes to the question of disqualification, a federal judge's discretion is very narrowly circumscribed by

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[7] *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524, n.12 (11th Cir. 1988).

the mandates of Sections 144 and 455 and The Code of Judicial Conduct for United States Judges. This Eleventh Circuit has stated the standard for recusal as follows:

> "Congress rewrote section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of section 455, a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist. Section 455 does away with the old 'duty to sit' doctrine and requires judges to resolve any doubts they may have in favor of disqualification.
>
> "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge. The standard for recusal under section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."

United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)(emphasis added) (citations omitted).

The "objective" test of § 455(a) is best understood in light of the problem which it was intended to address.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg, 486 U.S. 864-65 (footnote omitted) (emphasis added).

The purpose of recusal is to protect the appearance as well as the reality of justice. "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance." *Hall v. Small Business Administration*, 695 F.2d 175, 176 (5th Cir. 1983). Thus the purpose of § 455 is "to promote public confidence in the judicial process." *Liljeberg*, 486 U.S. 860. The question, then, is not "whether there was actual bias," but whether there was "'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Spruell v. Jarvis*, 654 F.2d 1090, 1095 (5th Cir. 1981).

While the alleged bias must be personal as opposed to judicial in nature, *United States v. Meester*, 762 F.2d 867, 884 (11th Cir. 1985), here the alleged bias is personal. "The objective appearance of bias arises out of a number of accusations made by defendant and his counsel concerning [the judge] and certain members of [his] staff." *United States v. Journet*, 620 F. Supp. 684 (W.D. Pa. 1985). See also *United States v. Meyerson*, 677 F. Supp. 1309 (S.D.N.Y. 1988) (Although prosecutor's allegations were untrue, judge voluntarily recused himself because his resentment of prosecutor's tactics prevented him from maintaining impartiality and appearance of impartiality that are necessary to the proper administration of justice.)

Since a reasonable judge would find it necessary to disqualify himself, or herself in the face of the allegations made by Petitioners' counsel in his complaint and prior recusal motions, the basis for disqualification here rises to constitutional dimensions. This is because the Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990).

In the words of the Eleventh Circuit, the question that must be answered is whether the material facts create a situation that "'Presents a potential for actual impropriety if the

worst implications are realized.'" *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 n. 12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied, 109 S. Ct. 2066 (1989). After drawing the worst implications from the material facts presented, the Eleventh Circuit has held that it must "resolve any doubts ... in favor of disqualification." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (emphasis added).

The Eleventh Circuit's violation of its own above-cited standards in Petitioners' cases is an abuse of discretion which permits a disqualified judge to usurp powers which by all rights belong only to a judge whose impartiality is beyond reasonable question in Petitioners' cases.

VI. CONCLUSION

> [Disqualification of a judge poses] no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; of what concern to other parties to have him so preside?

Through a *per curiam* writ of certiorari reversing and directing reassignment on remand, Petitioners respectfully pray that this Court intervene in their causes and accord them that "level playing field" guaranteed them by the Due Process Clause and other standards -- rights which have become "more honored in the breach than in the observance" in Petitioners' cases.

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[8] *Berger v. United States*, 295 U.S. 22, 35 (1921).

Franklin R. Nix
Counsel for Petitioners

September 24, 1992

APPENDIX

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IN THE UNITED STATES COURT
OFAPPEALS FOR THE
ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 26 1992
MIGUEL J. CORTEZ
CLERK

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

On Petition for Writ of Mandamus/Prohibition

BEFORE: FAY, BIRCH and DUBINA, Circuit Judges.

The petition for writ of mandamus/prohibition filed in this matter is DENIED.

Filed at 10:05 A.M.

DEC 30 1991

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning December 27, 1991, to handle the motions to quash the subpoenas directed to Chief Judge Wilbur D. Owens, Jr., Judge J. Robert Elliott, and Judge Duross Fitzpatrick, and any matter relating to any party's attempt to take the depositions of those judges, in Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by and through its Trustees, Consolidated Civil Action File No. 86-43-1-

MAC(WDO), and United States of America v. Robert L. Watkins, Criminal No. 89-46-MAC(WDO), until completion of the matter and thereafter as may be required to complete unfinished business.

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: December 27, 1991

A - 4

Filed at 4:45 P.M.

JUL 27 1992

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

DESIGNATION OF DISTRICT JUDGE FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign

THE HONORABLE WILLIAM TERRELL HODGES

United States District Judge for the Middle District of Florida to hold a district court in the Middle District of Georgia for an indefinite period of time beginning July 23, 1992, to handle a hearing in which Franklin R. Nix has been ordered by Chief Judge Wilbur D. Owens, Jr. to show cause why he should not be sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure in Curtis Cheeves, et al., Theodore Gibson, et al. v. Southern Clays, Inc. and The Rhode Island Charities Trust, by

and through its Trustees, Consolidated Civil Action File No. 86-43-1-MAC(WDO), and United States of America v. Robert L. Watkins, Criminal No. 89-46-MAC(WDO).

/s/ Gerald Bard Tjoflat
Chief Judge
United States Court of Appeals
for the Eleventh Circuit

Dated: July 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 4:45 P.M.

JUN 5 1992

/s/ Helen F. Newberry
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

CURTIS CHEEVES, et al.
Plaintiffs,

vs.

SOUTHERN CLAYS, INC., et al.,
Defendants.

C. A. NO. 86-43-1-MAC (WDO)
86-44-2-MAC (WDO)

ORDER

Before the court is plaintiffs' fifth motion to recuse this judge under Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct, 28 U.S.C. § 455, and the Fifth Amendment. The grounds alleged for recusal are the same grounds alleged and rejected on the four previous motions for recusal.

DISCUSSION

Title 28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himshelf in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party ....

Canon 3(E)(1) provides that:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where ...
>
> (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer.

The test for recusal under both § 455(a) and Canon 3(e)(1) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). The alleged bias or prejudice must stem from an extrajudicial source. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988). As this court has previously determined, see Orders of January 17, 1990, January 30, 1990, May 23, 1990, and December 13, 1991, Nix has failed to demonstrate any extrajudicial bias on the part of this judge.[1] Nor has Nix raised any new allegations in his latest motion to recuse this judge.

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[1] In addition, the Eleventh Circuit has denied Nix's petition for writ of mandamus and prohibition seeking recusal of this judge in the instant action. No. 90-8561 (June 25, 1990).

This court does not have, with due respect to Mr. Nix's demands, a duty to reconsider the same allegations over and over again.

Furthermore, this court's rulings in the four previous recusal motions are insufficient to justify recusal. *Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). In rare circumstances, however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.

With respect to plaintiffs' Fifth Amendment claim, "it would be anomalous to hold that a claim under [sections 455 and 144] insufficient on its merits could nevertheless satisfy the constitutional standard." *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2nd Cir. 1980). Therefore, this court's rejection of plaintiffs' claims under section 455 "*a fortiori* defeats [their] due process allegations." Id.

For the reasons set forth above, the court concludes that a reasonable person who knows all the facts would not find that this judge's impartiality might reasonably be questioned. Consequently, plaintiffs' motion to recuse this judge is hereby DENIED.

The court finds that this fifth motion to recuse has risen to the level of harassment. Nix has thirty days to show cause in writing why the court should not impose Rule 11 sanctions.

So ORDERED, this 5th day of June, 1992.

/s/ Wilbur D. Owens, Jr.

WILBUR D. OWENS, JR.,
UNITED STATES DISTRICT JUDGE

CL:lab

ENTERED ON DOCKET
June 5, , 19 92
Gregory J. Leonard, Clerk
by: /s/ Helen F. Newberry
Deputy Clerk